

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	No. 62056-8-I
	)	
Appellant,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JESUS SERJIO JIMENEZ,	)	
	)	
Respondent.	)	FILED: September 28, 2009

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Schindler, C.J. — Jesus Jimenez appeals his 150-month exceptional sentence. Jimenez argues that the court improperly imposed the exceptional sentence upon a basis not found by the jury in violation of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). However, because the record supports the conclusion that the court imposed the exceptional sentence based on the jury finding that the State proved beyond a reasonable doubt the aggravating factor of a major violation of the Uniform Controlled Substances Act, chapter 69.40 RCW, we affirm.

Between August and October of 2007, Jimenez sold methamphetamine six different times to an undercover police officer. The State charged Jimenez with possession of methamphetamine with intent to manufacture or deliver, unlawful possession of a firearm, six counts of delivery of methamphetamine,

maintaining a vehicle or premises for the purpose of drug trafficking, and forgery.

The State also filed a notice of intent to submit to the jury two aggravating factors in support of an exceptional sentence above the standard range: (1) the current offenses were “major violations” of the Uniform Controlled Substances Act, and (2) that Jimenez committed the offenses shortly after being released from incarceration. RCW 9.94A.535(3)(e); RCW 9.94A.535(3)(t). The State later agreed that it would pursue only the major violation aggravating factor and would not submit evidence at trial on rapid recidivism.

At the conclusion of the trial, the jury convicted Jimenez on all counts and returned special verdicts finding a major violation of the Uniform Controlled Substances Act with regard to six counts of delivery of methamphetamine and possession of methamphetamine with intent to deliver.

At sentencing, the State asked the court to impose a 240-month sentence based on the aggravating factor found by the jury and based on other offenses going unpunished. The defense urged the court to impose a standard range sentence of 90 months. The court imposed an exceptional sentence of 150 months, 30 months above the top of the standard range. The judgment and sentence expressly states that the exceptional sentence is based on the aggravating factor “found by the jury by special interrogatory attached.” The court’s written findings of fact and conclusions of law also state that the exceptional sentence is based on the jury’s findings.

Jimenez does not challenge the jury finding that his convictions were

each a major violation of the Uniform Controlled Substances Act. But for the first time on appeal, Jimenez argues that the trial court violated Blakely by imposing an exceptional sentence, not on the basis of the aggravating factor found by the jury, but instead, upon rapid recidivism.

Blakely requires that any fact, other than the fact of a previous conviction, used to support an exceptional sentence upward must be found by a jury beyond a reasonable doubt. Blakely, 542 U.S. at 301-03. In response to the Supreme Court's decision in Blakely, our legislature identified certain aggravating circumstances that can justify an exceptional sentence and procedures governing the imposition of an exceptional sentence. RCW 9.94A.535(2)(3); RCW 9.9A.537(2). The facts to support an aggravating factor must be (1) proved to a jury beyond a reasonable doubt, (2) upon evidence presented during the trial of the crime alleged, and (3) the jury must unanimously agree by special interrogatory. RCW 9.94A.537(3), (4).

A "major violation" of the Uniform Controlled Substance Act is an aggravating factor that justifies imposition of an exceptional sentence. To establish a major violation, the State must prove beyond a reasonable doubt that:

The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold,

transferred, or possessed with intent to do so.

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; . . .

RCW 9.94A.535 (3)(e)(i)-(v).

Jimenez relies on the court's reference in the written findings to his "unwillingness to change" and the court's reference in the oral ruling to Jimenez's unwillingness to change despite his prior convictions, to argue that the court impermissibly relied on rapid recidivism in imposing the exceptional sentence. In the oral ruling, the court stated in part:

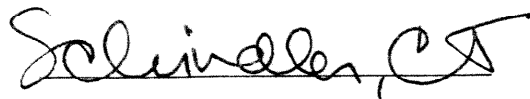
The jury did make decisions due to the aggravating factors, the jury doesn't see what your attorney and Ms. Johnson see every day, so they have nothing to compare your activity with in terms of other dealers. In some senses you are a mid- to upper-mid-level dealer in this Court's opinion, but when the really large dealers get caught it seems those become Federal Cases, not usually County Cases.

In looking at your priors, your refusal to change your lifestyle, the quantities, at least at the end of law enforcement's transactions with you and your own statements about how much you're bringing in would seem to be consistent with the evidence obtained, and balance that with the standard range, this Court finds that the[re] is, in fact, a basis to exceed the standard range and declare an exceptional sentence upward based on those factors, the aggravating factors, and your unwillingness to change your lifestyle despite two prior rather significant terms in prison.

Viewed in the context of the court's entire oral ruling, the court's reference to

Jimenez's unwillingness to change after previous convictions does not signify the court's reliance on a factor not found by the jury. Instead, the court commented on Jimenez's repeated return to the drug business after serving prison terms for drug trafficking offenses in the context of discussing Jimenez's place in the drug hierarchy and in deciding where his sentence should therefore fall within the range of 60 to 240 months. In explaining the decision to impose an exceptional sentence, the court noted that while the jury found a major violation of the Uniform Controlled Substances Act, the jury did not have a frame of reference to compare Jimenez's activity to other drug dealers. The court considered the frequency and quantity of Jimenez's drug activity, and his pattern of selling both street-level amounts and dealer amounts, in concluding that Jimenez was a mid-level dealer. The court found that Jimenez's position in the drug hierarchy supported the jury finding of a major violation of the Uniform Substances Act and justified a sentence above the standard range, but declined to impose the 240 months the State requested.

We conclude that the court did not improperly impose an exceptional sentence based on a factor that was not submitted to and determined by the jury, and affirm.<sup>1</sup>

A handwritten signature in black ink, appearing to read "Schneider" followed by a stylized monogram or initials.

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<sup>1</sup> Jimenez also contends the trial court erred in not entering written CrR 3.5 findings and conclusions, and asks this court to remand. However, written CrR 3.5 findings have now been filed and the findings reflect the court's detailed oral decision.

No. 62056-8-1/6

WE CONCUR:

Appelwick, J.

Ajid, J.